INDEX

CITATIONS

730517—47——1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 813

DENNY MARTINI AND MILDRED MARTINI, INDIVIDUALLY AND DOING BUSINESS AS LAKESIDE CUT-RATE LIQUOR STORE, PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The district court rendered no opinion. Its findings of fact and conclusions of law appear at pages 13–16 of the record. The majority and dissenting opinions of the Circuit Court of Appeals (R. 277–295) are reported at 157 F. 2d 35.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 18, 1946 (R. 295–296). The petition for rehearing was denied on September

25, 1946 (R. 296). The petition for a writ of certiorari was filed on December 23, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

Where certain sales of whiskey were subject to a maximum price regulation which required the seller to apply to the Office of Price Administration, before selling, for a method of computation of ceiling prices, and the seller failed to make such application at any time, and the Price Administrator, after instituting a damage action against the seller, issued an order definitely fixing the ceilings for these prior sales:

(1) Whether the exclusive jurisdiction provisions of Section 204 (d) of the Emergency Price Control Act, as amended, required the courts below to assume the validity of the Administrator's order and apply it to the sales to which it was expressly applicable:

(2) If Section 204 (d) be regarded as inapplicable, whether the petitioner, who illegally failed to apply for a method of determination of his maximum prices has standing to assert and is correct in his position, that the Administrator is without power to establish prices applicable to the prior sales:

(3) Whether Section 205 (e) of the Emergency

Price Control Act, before the amendments of 1944, was void for uncertainty and for delegation of legislative power in so far as it defined a buyer who might bring an action for statutory damages based upon overcharges as one "who buys such commodity for use or consumption other than in the course of trade or business:"

(4) Whether the petitioners and the dealer who sold to them were joint tort-feasors and whether the petitioners were released from liability because a release was given to the dealer.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (hereinafter referred to as the Act), and of the General Maximum Price Regulation (hereinafter referred to as the GMPR) are set forth in the Appendix, *infra*, pp. 13–18.

STATEMENT

Petitioners in 1943 sold a quantity of Dunbar's Canadian Whiskey (a three-year-old blended Canadian whiskey) to taverns, bars, liquor stores, markets, and similar purchasers (R. 28, 50, 52, 67, 69, 72, 108). Neither liquor of this particular kind nor a similar commodity had been sold at wholesale during March, 1942, by petitioners or their competitors, nor had petitioners sold any whiskey at wholesale during that month (R. 58,

139–143, 279).[1] Section 1499.2 (a) of the GMPR established maximum prices at the highest price charged by the same seller for the same or a similar commodity during the month of March, 1942. Where this provision was inapplicable, Section 1499.3 (a) provided a formula for converting prices charged by the same seller for comparable commodities during March, 1942, if sold at the same distributive level. Where, as here, none of the foregoing provisions of the GMPR were applicable, Section 1499.3 (c) of that regulation, *infra*, pp. 17–18, provided that the maximum price was to be one established after specific authorization by the Office of Price Administration following application by the seller. No such application was made by petitioners, nor was any authorization given (R. 229). In July and August, 1943, petitioners sold large quantities of Dunbar's Canadian whiskey at prices of $57.50 and $62.50 per case (R. 31, 51, 52, 67, 188), establishing this price themselves without regard to the maximum price regulations.[2]

---

[1] The court below stated that petitioners had not sold at wholesale during March, 1942. Evidence to support this statement is contained in the deposition of Denny Martini, the original of which was admitted in evidence at the trial and upon stipulation of the parties and order of the trial court was lodged with the court below during the appeal. Petitioners have not included the deposition in the record in this Court (R. 23–24).

[2] Martini testified that he telephoned the Office of Price Administration to find out the ceiling price, and was told to "make yourself a fair profit and go ahead and sell the whiskey." (R. 223.) His testimony was not believed (Finding of Fact 9, R. 15).

On November 24, 1943, an action for statutory damages under Section 205 (e) of the Emergency Price Control Act, based on overcharges in connection with sales of this liquor was instituted against the petitioners and various other persons from whom the petitioners had purchased the liquor or through whom they had sold it (R. 2–4). Before the trial, the Administrator settled his claim against defendant Schutz, from whom the petitioners had purchased the whiskey, and against Garibotti and Novone, whose contract Schutz had taken over. While the trial was in progress, an Order was issued by the Regional Administrator on June 24, 1944, establishing, *inter alia,* maximum prices for sales of Dunbar's Canadian whiskey made at wholesale by the petitioners prior to August 31, 1943, at $37.61 per case (R. 240–242). The trial court found that the petitioners had sold this whiskey at prices in excess of the maximum prices specified by the Regional Administrator's Order by $15,169.70, and, having found that the petitioners had failed to sustain their burden of establishing that the overcharges were the result neither of wilfulness nor failure to take practical precautions to prevent their occurrence (R. 14), awarded full treble damages, and entered judgment for the Price Administrator in the amount of $45,509.00 (R. 17–18. This judgment was affirmed on appeal by the Circuit Court of Appeals for the Ninth Circuit (Denman, J., dissenting). The majority

of that court reached its conclusion primarily by a consideration of the issue of the validity of the retroactive maximum pricing order, but also indicated that, by virtue of the exclusive jurisdiction provisions of Section 204 (d) of the Act, such issues of validity could be raised only before the Emergency Court of Appeals.

DISCUSSION

In deciding the issues presented concerning the Regional Administrator's Order of June 24, 1944, the decision of the court below can be construed as resting on two grounds: (1) that the issuance of the retroactive provisions of the order constituted a valid exercise of the Price Administrator's power, and (2) that jurisdiction to determine the validity of the order was placed exclusively in the Emergency Court of Appeals by Section 204 (d) of the Emergency Price Control Act, *infra*, p. 14.

The issues presented by this case are almost identical with those of *Senderowitz* v. *Fleming*, now pending on a petition for writs of certiorari, Nos. 677 and 678 at this Term, and the respondent respectfully refers the Court to his Memorandum in that case. For the reasons stated in that memorandum, pages 8–9, we believe the second phase of the decision of the court below is correct, and that the issue involving the alleged invalidity of the retroactive provisions of the pricing order involved in the instant case is therefore

beyond the jurisdiction of the court below to determine, or of this Court to determine in this proceeding. Likewise, we think that the reasoning which it employed with respect to the validity of the order is sound, for the reasons stated on pages 10–12 of our Memorandum in the *Senderowitz* case.[3]

II

The pronouncements of the court below with respect to the validity of the retroactive order of the Regional Administrator may be fairly said to be in conflict with the decision of the Emergency

[3] Petitioners in the instant case also seek to escape the effect of the pricing order involved by asserting that it was prospective only in application. The construction given by both courts below, however, is clearly correct. The ceiling price designated in paragraph (a) of the Order (*infra*, p. 19), expressly covers "sales * * * made prior to August 31, 1943." Furthermore, paragraph (c) of the Order provides the method of pricing for sales made after that date, and hence would conflict with paragraph (a) if the petitioners' construction were correct. Even in the absence of specifically retroactive language such as is here present, a pricing order issued after a seller's failure to make application before selling, was construed in *Porter* v. *Kramer*, 156 F. 2d 687 (C. C. A. 8), to be applicable retroactively as well as prospectively.

Petitioners also assert that their sales were at retail and hence that the measure of damages should not have been computed upon the wholesale ceiling. But the undisputed evidence that the sales in question were made to taverns, bars, liquor stores, markets, and similar purchasers (R. 28, 50, 52, 69, 72, 108), in quantities of as much as five hundred cases per transaction (R. 81, 88), clearly substantiates the conclusions of the courts below.

730517—47——2

Court of Appeals in the case of *Collins* v. *Fleming* (not yet reported), Nos. 352, 353, 357, Emergency Court of Appeals, decided January 2, 1947 (copies of the opinions are being lodged with the Clerk of this Court in the *Senderowitz* case, *supra*), rehearing denied, January 30, 1947, in which the Government contemplates filing a petition for a writ of certiorari in this Court because of the conflict and the importance of the question.

The regulatory provision applicable in the *Collins* case is identical with that in the case at bar, Section 1499.3 (c) of the General Maximum Price Regulation (*infra,* pp. 17–18). In each case, the seller did not apply as required, and in each case, after the Administrator had commenced a suit for damages under Section 205 (e) of the Act he issued an order specifying[4] the maximum prices applicable to the particular sales. The Emergency Court of Appeals held that no such further administrative action was proper; the Circuit Court of Appeals for the Ninth Circuit in the in-

[4] The order in the *Collins* case precisely followed the statement in Section 1499.3 (c) of the GMPR, that the authorization "will be given in the form of an order prescribing a method of determining the maximum price." The Order in the instant case took the additional step, after selecting the method of determination, of computing the prices in terms of dollars and cents. As the court below pointed out (R. 284, 285), the petitioners' rights could scarcely have been prejudiced thereby.

stant case—just as did the Circuit Court of Appeals for the Third Circuit in the *Senderowitz* case [5]—has expressed a contrary view.

For the reasons stated in our Memorandum in the *Senderowitz* case, *supra*, we believe that the decision of the court below is correct and that the decision of the Emergency Court of Appeals in the *Collins* case is wrong, and likewise that resolution of the conflict is sufficiently important to warrant review of the question by this Court. The presence of the jurisdictional issue herein may, however, as we stated in the respondent's memorandum in the *Senderowitz* case, render this case an inappropriate one in which to resolve the conflict. Nevertheless, if this Court is of the opinion that the present case is also an appropriate vehicle for resolution of the conflict, we would not oppose the granting of the writ herein sought with respect to that question and the issue as to the exclusive jurisdiction of the Emergency Court of Appeals.

---

[5] The opinion on Petition for Rehearing in the *Collins* case expressly leaves open the question of the validity of a retroactive order issued upon application by the seller. On that basis, a distinction can be drawn between the *Collins* and *Senderowitz* cases, since in the latter a report, under Section 1499.3 (b) (1) of the GMPR (which is analogous to an application under Section 1499.3 (c)), was belatedly filed. No such distinction, however, can be drawn between the *Collins* case and the case at bar, as in neither case did the seller make application at any time.

III

Petitioners contend that Section 205 (e) of the Emergency Price Control Act *infra*, pp. 14–17, before the amendments of 1944,[6] was void for uncertainty and for delegating legislative power to the courts, because it authorized a suit by the buyer when he had purchased "for use or consumption other than in the course of trade or business" and gave the Price Administrator authority to sue where the buyer was not so qualified. It is submitted that this clause of Section 205 (e) is not illegally vague and uncertain. The words "trade" and "business" have been used immemorially in commerce and in the daily affairs of the nation. Their meanings are too well established for it to be said that their use in a provision of law causes it to become illegally vague and uncertain. Furthermore, the clause here involved has been construed and applied many times by the courts without the perplexity suggested by petitioners, and there is unanimity of opinion that a sale to one who purchases a commodity to be used for commercial or business purposes is a purchaser "in the course of trade or business" whether or not he is the ultimate consumer of the product

[6] The situation to which the petitioners' contention on this point is addressed persisted in part even after the 1944 amendments; thenceforth, the Administrator was empowered to bring the action where the purchase had not been for use or consumption in the course of trade or business, only if the buyer had not brought the action within thirty days after the violation.

in the form in which he purchased it. Cf. *Bowles* v. *Seminole Rock & Sand Co.*, 145 F. 2d 482 (C. C. A. 5), reversed on other grounds, 325 U. S. 410; *Speten* v. *Bowles*, 146 F. 2d 602 (C. C. A. 8), certiorari denied, 324 U. S. 877; *Bowles* v. *Rogers*, 149 F. 2d 1010 (C. C. A. 7); *Bowles* v. *Jones*, 151 F. 2d 232 (C. C. A. 10); *Bowles* v. *Trullinger*, 152 F. 2d 191 (C. C. A. 9); *Bowles* v. *Whayne*, 152 F. 2d 375 (C. C. A. 6); *Bowles* v. *Barker*, 155 F. 2d 1022 (C. C. A. 7); *Lightbody* v. *Russell*, 293 N. Y. 492.

Nor is there any merit to petitioners' contention that the release given to defendant Schutz constituted a release of a joint tort-feasor, which should have been held to discharge the petitioners as well. Schutz sold to the petitioners at $35.72 per case, in violation of the Act, and the petitioners sold to a number of retailers, bars, etc., at $57.50 and $62.50 per case, in violation of the Act. These were separate and distinct transactions and violations; each wrongdoer was liable for his respective violations, and the liability of the petitioners and Schutz was in no respect joint. Cf. *Veazie* v. *Williams*, 8 How. 134, 159; *Pittsburgh Rys. Co.* v. *Chapman*, 145 Fed. 886 (C. C. A. 3); *Husky Refining Co.* v. *Barnes*, 119 F. 2d 715 (C. C. A. 9).[7]

[7] Neither is there merit in petitioners' contention that the trial court's exoneration of their agents, Reed and Hoffman, should exonerate them. Petitioners, as sellers, were held liable for their own participation, not on any theory of *respondeat superior*.

CONCLUSION

The judgment of the court below is correct. However, if this Court considers this case a proper vehicle for resolution of the conflict of decisions herein pointed out, we do not oppose the granting of the writ, except as to the issues discussed in Point III hereof. As to those issues the petition should be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN R. BENNEY, *Attorney.*

WILLIAM E. REMY,
Deputy Commissioner for Enforcement,
DAVID LONDON,
Director, Litigation Division,
SAMUEL MERMIN,
Solicitor, Litigation Division,
ALBERT J. ROSENTHAL,
Special Appellate Attorney,
Office of Price Administration.

FEBRUARY 1947.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

1. *Emergency Price Control Act.*—The pertinent sections of the Emergency Price Control Act, as amended[1] (56 Stat. 23; 58 Stat. 632; 50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

Section 2 (*c*). "Any regulation or order under this section may be established in such form and manner, may contain such classification and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. * * *"

Section 2 (*g*). "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

Section 4 (*a*). "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under

[1] Roman type is used to indicate text which has not been changed since original enactment, and italics are used to indicate amendments.

section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 201 (d). "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Section 204 (d). * * * "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

Section 205 (e). "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maxi-

mum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater*: (1) *Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or* (2) an amount not less than *$25 nor more than $50, as the court in its discretion may determine: Provided, however, that such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurence of the violation.*[2] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable*

[2] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

maximum price.[3] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.*[4] *[The amendment made by subsection (b),*[5] *insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the*

[3] Added by sec. 108 (b) of Stabilization Extension Act of 1944.

[4] As amended by sec. 108 (b) of Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

[5] Sec. 108 (c) of Stabilization Extension Act of 1944.

violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]"

2. *General Maximum Price Regulation.*

Section 1499.1 (*a*)—(7 F. R. 3153).

Section 1499.1. "Prohibition against dealing in commodities or services above maximum prices. On and after the effective date of this Regulation, regardless of any contract or other obligation:

"(a) No person shall sell or deliver any commodity and no person shall sell or supply any service, at a price higher than the maximum price permitted by this Regulation; * * *"

* * * * *

§ 1499.2. "The seller's maximum price for a commodity or service which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the Regulation. Such price shall be determined by the seller in accordance with the following procedures: * * *"

§ 1499.3. "Maximum prices for commodities and services which cannot be priced under § 1499.2. * * *

(c). In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a

price determined by the seller after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under § 1499.2 or § 1499.3 (a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. Such authorization will be given in the form of an order prescribing a method of determining the maximum price" (7 F. R. 7093).

Section 1499.3 (e) (1), as added by Amendment 61 (9 F. R. 5169).

"(e) (1). The Price Administrator, or any Regional Administrator or any State or District Director so authorized by his Regional Administrator, may at any time approve, disapprove or revise maximum prices reported, proposed or established under paragraphs (a), (b) (1), or (c) of this section so as to bring them into line with the level of maximum prices otherwise established by this regulation."

3. *Order of June 24, 1944:*

UNITED STATES OF AMERICA

OFFICE OF PRICE ADMINISTRATION

SAN FRANCISCO REGIONAL OFFICE

Region VII

File No: VIII-3(c)-144

DENNY MARTINI AND MILDRED MARTINI,
dba Lakeside Cut-Rate Liquor Stores,
San Francisco, California.

ORDER UNDER SECTIONS 3 (A) AND 3 (C) OF THE GENERAL MAXIMUM PRICE REGULATION

For the reasons set forth in an Opinion attached hereto and pursuant to authority vested in the Regional Administrator by Sections 3(a) and 3(c) of the General Maximum Price Regulation it is hereby ordered:

(a) The maximum price which Denny Martini and Mildred Martini doing business as Lakeside Cut-Rate Liquor Stores, hereafter referred to as Dunbar's Canadian Whiskey, 90.4 proof, made prior to August 31, 1943, shall be $37.61 per case of 12 fifths, f. o. b. applicants warehouse.

(b) The maximum price which applicants may charge for sales at retail of Dunbar's Canadian Whiskey, 90.4 proof, made prior to August 31, 1943, shall be $50.02 per case of 12 fifths.

(c) For sales of such whiskey made on and after August 31, 1943, applicants shall price in accordance with Maximum Price Regulation No. 445, as amended.

(d) For all sales covered by paragraphs (a), (b), and (c) of this order applicants must maintain the records required by Maximum Price Regulation No. 445, as amended, including those specified in Section 7.9.

(e) This order shall become effective upon its issuance.

(f) This order shall be subject to correction, revocation, or amendment at any time hereafter, either by special order or by any price regulation issued hereafter or by any supplement hereafter issued as to any price regulation, the provisions of which may be contrary hereto.

BEN C. DUNIWAY,
Acting Regional Administrator.

Issued and effective June 24th, 1944.

The accompanying order sets maximum prices on Dunbar's Canadian Whiskey 90.4 proof, in cases of 12 fifths, sold prior to August 31, 1943, by the applicants above named.

Neither applicants or any competitor sold the same or similar whiskey during March 1942.

Applicants did not sell any whiskey at wholesale during March 1942. Consequently they can not determine a maximum price for wholesale sales of this whiskey pursuant to Section 3 (a) of the General Maximum Price Regulation.

The order establishes in addition to a wholesale price a retail price for sales by applicants prior to the effective date of Maximum Price Regulation No. 445. No report has been filed by applicants under Section 3 (a) of the General Maximum Price Regulation covering any of its sales

of this whiskey at retail. In no event would a retail price of more than $50.02 be approved by this office.

The maximum prices established were determined by following the formulas set forth in Maximum Price Regulation No. 445.

BEN C. DUNIWAY,
Acting Regional Administrator.

Issued and effective June 24, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1947